No. 896

No. 5009.

APR 24 1956
HAROLD B. WILLEY, Cl

United States Court of Appeals
For the First Circuit

PATRICK McHUGH,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

PETITION FOR REHEARING
AND
RECORD APPENDIX THERETO
~~AND~~
~~BRIEF IN SUPPORT OF PETITION.~~

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United States Court of Appeals
For the First Circuit

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PATRICK McHUGH,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

PETITION FOR REHEARING.

The appellant respectfully requests a rehearing in the above case for the following reasons:

1. The indictment, viewed in the light of the legal relationship between boat owner and fisherman long recognized by this Court and other courts and tribunals, does not set out a violation of the Anti-Trust Laws. This indictment involves an agreement between employee fishermen represented by a labor union and boat owners represented by an association. *Allen Bradley Company* v. *Union*, 325 U.S. 797, is not applicable to such an agreement.

2. The indictment does not allege that the appellant knowingly and personally "has authorized, ordered or

done" the acts alleged (R. p. 5) and therefore he is exempt from criminal liability under section 6 of the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C.A. sec. 101 et seq.)

3. The order of probation without the suspension of imposition or execution of sentence is invalid in the light of the purposes of the Probation Act, 18 U.S.C. sec. 3651 et seq., and principles regulating the interpretation of judgments.

4. The condition of probation that the "defendant shall not become active either directly or indirectly in the operation, management or control of the Atlantic Fishermen's Union, Seafarers International Union of North America, A. F. of L. and Atlantic Fishermen's Union, Seafarers International Union of North America, A. F. of L., New Bedford" is invalid because:

(a) The condition interferes with the rights of the appellant and the union under section 7 of the National Labor Relations Act, 49 Stat. 449 as amended by Public Law No. 101, 80th Cong. 1st Sess., 29 U.S.C.A. Sec. 141 et seq. and the First Amendment to the Constitution and is prohibited by sections 1 and 4 of the Norris-LaGuardia Act;

(b) The reason as declared by the lower court for this condition was activities protected by the Norris-LaGuardia Act, the National Labor Relations Act and section 20 of the Clayton Act (Act of October 15, 1914, chapter 323, 38 Stat. 730, as amended, 15 U.S.C.A. sec. 12 et seq.);

(c) The imposition of this condition, if appropriate at all, is appropriate only in a civil suit under the safeguards and limitations provided in section 4 of the Sherman Act (26 Stat. 209, 15 U.S.C.A. sec. 1 et seq.)

and Rule 65(d) and 52(a) of the Rules of Civil Procedure. If such an order is valid, it is reviewable as an injunction in a civil suit.

5. In view of the unprecedented action by the trial court the appellant should be permitted to withdraw his plea of nolo contendere and stand trial.

Respectfully submitted:

REUBEN GOODMAN
Attorney for Defendant, Appellant

Of Counsel:
Law office of Paul T. Smith

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

REUBEN GOODMAN

RECORD–APPENDIX TO PETITION FOR REHEARING.

Hearing, October 4, 1954, Court Room No. 5, Federal Building, Boston, Massachusetts.

P. 19 l. 15 - p. 20 l. 22: The Court: I wouldn't want anyone to feel for one minute that I have other than a heart filled with historical appreciation for the great contribution that the unions have made toward the welfare of this country, the welfare of the world. They had their beginning with the guilds. They were conceived in conformity with the philosophy behind the Ten Commandments. They were designed to protect a very, very important part of our manhood and womanhood. They were designed to protect the workingman. Over the centuries they have done very, very well. I have no doubt in my mind but what those who were interested in this Atlantic Fishermen's Union were desirous of having their members, their associates get a decent living wage. But I also have a feeling of great respect for the implications that flow from the provisions of the Sherman Anti-Trust Act.

It was designed to create abodes of peace where men live and let live. I'm bothered by this case. I remember reading the decision of the Massachusetts Supreme Court in connection with this whole subject matter. This is really an elaboration of that case.

I can remember there was a very distinguished judge, for whom I have a great deal of affection. He was a wonderful man, Judge Broadhurst, who sat on that case. I may be wrong. It went to the Supreme Court of the Commonwealth. I can understand the inhibitions of men who feel something should be done for those who represent that which is so essential to the progress of our nation's welfare. That is the working class, the men and women who love their God

and country. On the other hand, we have to think of people who depend upon foodstuff, who depend upon things that are necessary for sustenance, and the corresponding right to expect to get their merchandise, get that which God intended they should have, in a competitive market reasonably safe for everything.

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"The captains of the vessels, except a few who own their vessels, are employed by the vessel owners.[2] The captains in turn hire the crew. The fishermen generally speaking, at least do not receive a daily or hourly wage. They are paid by a share of the proceeds of their catches called the lay. The lay is calculated after

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 896

PATRICK MCHUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. 18–24) is reported in 230 F. 2d 252.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1956, and a timely petition for rehearing was denied on March 27, 1956. The petition for a writ of certiorari was filed on April 24, 1956. The jurisdiction of this Court is invoked under 28 U. S. C 1254 (1).

QUESTIONS PRESENTED

Petitioner (a union official), the union, and an association of businessmen, among others, were indicted for violation of Sections 1 and 2 of the Sherman Act. Petitioner pleaded *nolo contendere*. He was sentenced to a $300 fine and placed on probation for two years on condition that during that period he refrain from the "operation, management, or control" of the union. The questions presented are:

1. Whether under 18 U. S. C. 3651 (the federal probation statute) an order of probation is invalid because it does not expressly state that imposition of sentence has been suspended.

2. Whether the district court abused its discretion by conditioning petitioner's probation on his refraining from direction of union activities for a two-year period.

STATUTES INVOLVED

The pertinent provisions of Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1, 2, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or

conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

18 U. S. C. 3651 provides in part as follows:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court

may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the the absence of express limitation, shall extend to the entire sentence and judgment.

* * * * *

STATEMENT

On November 15, 1951, the grand jury returned an indictment against the Atlantic Fishermen's Union, its New Bedford, Massachusetts, branch, five union officials, including petitioner, and an association of fishing boat owners. The indictment charged that defendants had combined and conspired to restrain trade and commerce in fish and scallops landed at the port of New Bedford, in violation of Section 1 of the Sherman Act (Count 1), and that they had monopolized that trade and commerce, in violation of Section 2 of that Act (Count 2).

The conspiracy was alleged to consist of a continuing agreement among the defendants to limit the amount and type of fish caught; to fix and maintain prices, terms and conditions of sales of fish to dealers in New Bedford; to compel and coerce dealers to purchase fish under terms and conditions which the defendants dictated; to require that all sales of fish in New Bedford be made through the fish auction controlled by the union; and to boycott dealers who purchased fish from fishermen outside the auction (Par. 18,

App. 8a–9a).[1] By such restrictive practices, the indictment alleged, the defendants also monopolized trade and commerce in the production and sale of fish in New Bedford (Pars. 23–24, App. 10a). Each of the individual defendants, including petitioner, was alleged to have "actively engaged in the management, direction, or control" of the union or its branch, and to have "authorized, ordered, or done some or all of the acts alleged herein to constitute the offense charged" (Par. 10, App. 5a–6a).

All the defendants, including petitioner, pleaded *nolo contendere* (App. 2a). The district court, after noting that petitioner previously had been restrained from similar violations by the Massachusetts state court, but apparently had failed to comply with that injunction (App. 28a–29a), sentenced petitioner to pay a fine of $300 and placed him on probation for 2 years subject to the condition that during that period he refrain from the "operation, management, or control" of the Union or its New Bedford branch (App. 29a–30a).

On appeal by petitioner, the Court of Appeals for the First Circuit unanimously sustained both the sufficiency of the indictment and the validity of the probation order. The court held that the district court's failure expressly to suspend imposition of sentence did not invalidate the pro-

[1] "App." refers to the appendix to petitioner's court of appeals brief.

bation order, because the federal probation statute (18 U. S. C. 3651) does not require an express statement of suspension if an intention to suspend "may be inferred from the general import of the judgment" (Pet. 23). The court further held that the district court had not abused its discretion in conditioning petitioner's probation on his refraining from the "operation, management, or control" of the defendant unions (Pet. 24).

ARGUMENT

1. Petitioner's principal contention (Pet. 6–10) is that the probation order is invalid because it does not expressly recite that the imposition of sentence is suspended. We submit, however, that the court of appeals correctly held that if the district judge in fact intended to suspend the imposition of sentence, as he did here (see *infra*), the probation order is valid even though it "incorporates no express language of suspension."

The federal probation statute (18 U. S. C. 3651) empowers the district court, after conviction or after a plea of *nolo contendere*, to "suspend the imposition or execution of sentence and place the defendant on probation for such period [not exceeding five years] and upon such terms and conditions as the court deems best." Under this provision, the court may place a defendant on probation if it either (1) imposes sentence and then suspends its *execution*, or (2) suspends its *imposition*. *Korematsu* v. *United States*, 319

U. S. 432; see *Roberts* v. *United States*, 320 U. S. 264, 268. The act does not require, however, that where the court suspends imposition of sentence the judgment so recite; it requires only that the court must in fact suspend imposition.[2] We submit that the court of appeals correctly held that such suspension of imposition "may be inferred from the general import of the judgment" even though the order does not expressly so state. Cf. *Ex parte De Angelo*, 50 F. 2d 847, 848 (C. A. 6) where the court in holding that the district's court's postponement of sentencing constituted a suspension of imposition of sentence, stated that "If what the court did, by whatever name it may be called, operated as a suspension of the imposition of sentence, it was clearly within the power of the court to do it."

Plainly, the district court here intended to suspend imposition of sentence when it placed petitioner on probation. Under the Sherman Act, petitioner was subject to fine not exceeding $5000, or to imprisonment not to exceed one year, or to both, for each violation. 15 U. S. C. 1

[2] Cf. Rule 32 (b) of the Federal Rules of Criminal Procedure, upon which petitioner erroneously relies (Pet. 8). That rule requires that the judgment of conviction set forth the steps taken in reaching that conviction, including the plea, the verdict or findings, and the adjudication and sentence. But failure of the judgment to recite one of the steps will not vitiate the judgment if in fact the step was taken. *Sanders* v. *Johnston*, 165 F. 2d 736 (C. A. 9), certiorari denied, 334 U. S. 829.

and 2. Section 3651 provides that "If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment." When the district court fined petitioner $300 and also placed him on probation, we think it clear that it thereby intended to suspend the imposition of the sentence of imprisonment and place him on probation with respect thereto.

Petitioner makes no claim that he has been prejudiced by the lack of a formal recital that imposition of sentence has been suspended, and it is clear that no prejudice has resulted. So long as petitioner observes the terms of his probation, he cannot be sentenced; and his probation can be revoked only after notice and opportunity for hearing. *Escoe* v. *Zerbst*, 295 U. S. 490. Thus, petitioner is in the identical position he would have been in if the order had expressly stated that imposition of sentence had been suspended.

2. Petitioner's other contentions (Pet. 10-17) challenge the district court's power to condition probation on non-participation in the "operation, management, or control" of the defendant unions for a period of two years. None of them has merit.

As previously noted, the Federal probation statute authorizes the trial court to suspend imposition of sentence and "place the defendant on probation for such period [not exceeding five

years] and *upon such terms and conditions as the court deems best.*" [Emphasis added.] In *Burns* v. *United States*, 287 U. S. 216, this Court, after reviewing the history and purposes of the probation statute, declared (p. 220) that the statute contemplates "an exceptional degree of flexibility in administration" in order to accomplish the Congressional purpose of insuring individuality of treatment for each offender, and that the trial judge was therefore given broad discretion to determine the terms and conditions of a probation order. The only question open to an appellate court in reviewing a probation order is "whether there has been an abuse of discretion, and [that] is to be determined in accordance with familiar principles governing the exercise of judicial discretion," *i. e.*, whether the order evinces "conscientious judgment, not arbitrary action" (p. 222–223).

We submit that the probation order here reflects "conscientious judgment, not arbitrary action," and that the court of appeals therefore correctly held that the trial judge did not abuse his broad discretion in conditioning petitioner's probation on his withdrawal from direction of union affairs.[2] The indictment charged that peti-

[2] Petitioner urges (Pet. 15) that appellate review of the condition here imposed should be broader than that "accorded the ordinary condition of probation." But the sole authority cited therefor, *Hartford-Empire Co.* v. *United States*, 324 U. S. 570, holds only that this Court may modify the terms of an antitrust decree; it does not support

tioner's activities in the "management, direction, or control" of the union violated the Sherman Act (App. 5a–6a) and, as the district court stated prior to imposing sentence (App. 28a–29a), petitioner previously had been restrained from similar violations by the Massachusetts state court, but apparently had failed to comply with that injunction. Under such circumstances, the trial court acted within its discretion in concluding that petitioner's rehabilitation "would proceed more effectively if he dissociated himself from all union organizational and administrative activity during the period of probation." *Berra* v. *United States*, 221 F. 2d 590, 598 (C. A. 8), certiorari denied as to this issue, 350 U. S. 910.

The other circuits which have passed upon this question are in accord that a trial judge may require a defendant, as a condition of probation, to give up temporarily the trade or business in connection with which the crime was committed. *Berra* v. *United States*, *supra*; *Stone* v. *United States*, 153 F. 2d 331 (C. A. 9); *United States* v. *Greenhaus*, 14 F. Supp. 368 (S. D. N. Y.), affirmed, 85 F. 2d 116 (C. A. 2), certiorari denied, 299 U. S. 596. In the *Berra* case the defendant, the business manager of a labor union medical service organization, was convicted, *inter alia*, of corruptly endeavoring to influence a witness be-

petition's contention (Pet. 16) that the court of appeals "should have exercised its own discretion on the record as to the propriety of this condition."

fore a grand jury and to obstruct, influence and impede the administration of justice, in violation of 18 U. S. C. 1503. The court suspended sentence on that count and put him on probation for five years, on condition that he not "directly or indirectly hold any office in or employment by" any labor organization or any organization affiliated with or sponsored by a labor organization. The court of appeals, in affirming the conviction and sentence, rejected as "untenable" defendant's contention that this condition "constituted an unlawful invasion of his right to earn a living," and upheld the condition on the ground that the "granting of probation and the terms and conditions thereof are matters clearly discretionary with the sentencing court" (p. 598). Similarly, in the *Stone* case the court of appeals upheld a condition on probation that the defendant, a dining car steward on an interstate train who had pleaded *nolo contendere* on an indictment charging him with theft from dining cars, should not for one and one-half years "apply for employment as or be employed as a steward or assistant steward on any railroad engaged in interstate commerce."

The contention (Pet. 13–15) that the condition is invalid because it is "essentially a civil sanction" misconceives the purpose of probation. Probation is designed to enable a defendant to rehabilitate himself (see *Roberts* v. *United States*, 320 U. S. 264, 272) and the condition

was imposed here not as punishment for the offense, but because of the court's view that petitioner's rehabilitation "would proceed more effectively" if during that period he dissociated himself from the union with which his prior affiliation has resulted in violations of law. *Berra* case, *supra*.

Petitioner's reliance (Pet. 10–13) on the Norris-LaGuardia and Clayton Acts is misplaced. The Sherman Act exemption which those acts provide for certain labor activities is lost if labor groups "combine with non-labor groups" (*United States* v. *Hutcheson*, 312 U. S. 219, 232) to "aid and abet business men to do the precise things which that [Sherman] Act prohibits," namely, fixing prices and protecting markets against competition. *Allen Bradley Co.* v. *Local No. 3*, 325 U. S. 797, 801, 810. Here the indictment alleged (App. 4a–5a, 7a–8a) that the unions and their officials had combined and conspired with the Seafood Producers Association (a group of businessmen) to restrain and monopolize trade—a charge that the labor group had "combine[d] with [a] non-labor group" to "aid and abet" the latter in violating the Sherman Act. Furthermore, there is no ground for suggesting that those Acts, which are designed to prohibit federal courts from enjoining certain labor activities, affect the court's power to fix the conditions of probation.

CONCLUSION

The decision below is correct, no important question is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1956.

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